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No. 1, ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

THE STATE OF GEORGIA,
Plaintiff.

vs.

THE TENNESSEE COPPER COMPANY
and
THE DUCKTOWN SULPHUR, COPPER AND IRON COMPANY, LTD.
Defendants.

IN EQUITY

Motion of Defendant, Ducktown Sulphur, Copper and Iron Company, to withdraw Exhibits, and for Modification of Decree Heretofore Entered.

JAMES A. FOWLER,
W. B. MILLER,
Attorneys.

MACGOWAN-COOKE, CHATTANOOGA

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IN EQUITY.

Motion of Defendant, Ducktown Sulphur, Copper & Iron Company, to Withdraw Exhibits, and for Modification of Decree Heretofore Entered.

MOTION.

Defendant, Ducktown Sulphur, Copper & Iron Company, hereby moves the Court grant the following relief:

(1) Permit it to withdraw color photographs and accompanying apparatus previously filed and exhibited on the hearing at the October Term, 1914.

(2) To modify previous decrees and restrictive orders with respect to defendant's plant and operations, conform-

ably to recommendations of Inspector John T. McGill (page 60 his report), filed January 1st, 1916, namely:

> "That, in ordinary conditions of the atmosphere, a total *sulphur content* of the gases escaping of not exceeding *forty* tons per day for *two consecutive days* during the period from May 1st to October 1st of each year be permitted; and not exceeding eighty tons per day for two consecutive days during the remaining months of the year."

I.

RELEASING EXHIBITS.

Certain color photographs were exhibited by defendant pursuant to order entered October Term, 1913. They are now in custody of the Clerk. They consist of glass slides which may be singly fitted to a special frame. They are believed to have entirely served all purposes herein. They are of value to defendant in that they show in miniature portions of the territory near defendant's plant, where it is claimed its operations have produced harmful results to vegetation, crops and timber. Such claims resulted in suits for damages, when the photographs were taken. Such litigations will shortly come to trial before the Courts of Tennessee, State and Federal. Defendant has no duplicates of such photographs. If required, it will return into this Court the exhibits if it can have them for a reasonable length of time. Adverse counsel will probably not resist the withdrawal of such exhibits, and an order is asked accordingly.

II.

MODIFICATIONS PROPOSED.

Chronologically, the facts deemed relevant are: May, 1907, the Court suggested "allowing a reasonable time to

defendants to complete the structures they now are building, and the efforts they are making to stop the fumes." (206 U. S. 230, 239.)

October, 1907, Georgia submitted "a motion to postpone the entry of the final decree in this case." Such suggestion and motion moved defendant to incur large expense in building an acid plant, installing costly appliances, and experimentation.

From October, 1907, to August, 1913, the case was continued under some arrangement between Georgia and Tennessee Copper Company, to defendant unknown. Consent of defendant was not asked to such continuance. Defendant paid nothing and was asked to pay nothing during the six years that intervened.

Meantime it issued bonds, raised moneys, and expended over $700,000.00 trying to meet the suggestion of the Court in May, 1907, and the invitation of Georgia in October following.

In 1909, defendant's acid plant was completed and has since continuously been in relatively successful operation. For some four years after 1909, defendant operated in substantially the same manner, *without any objection by Georgia.* During that period a second continuance for some three years was agreed between Georgia and Tennessee Copper Company. Defendant was not consulted with respect to such agreement.

August, 1913, Georgia offered to contract with defendant to withhold action as to it for three years, if it would pay $8,500.00 per annum for operating its plant substantially as it had been doing then for four years. Otherwise, to apply for injunction herein as originally sought. Defendant maintained its operations were doing no dam-

age in Georgia territory, and declined to pay the $8,500.00 per annum.

It offered to bear expense of an impartial investigation by a board of capable scientists, and abide the result. Such offer was rejected, and instead application for a permanent injunction was made *against defendant alone.*

Defendant, insisting it had met the suggestion in the initial pronouncement by the Court, and the invitation of Georgia in 1907, asked permission to so show by proof.

April, 1914, leave was granted both parties to take proof relating "solely to the changed conditions, if any, which may have arisen since the case was originally decided" — May, 1907.

Proof was taken, and the case then heard on motion of Georgia for injunction, when a majority opinion announced that "a full and complete disclosure of the improvements installed by defendant, and the results continuously obtained has not been presented." The proof thus taken by defendant was obviously too narrowly confined to "changed conditions" since 1909, when its acid plant was installed, and did not detail "the results continuously obtained" thereafter.

Consequently, June 1st, 1915, Dr. John T. McGill was named as inspector (237 U. S. 678) to observe defendant's operations for six months, "the quantity and character of smoke emitted thereform, and the resulting effect upon vegetation within the vicinity and in the State of Georgia. At the end of that time he shall make a full report of his observations, accompanied by *recommendations* as to appropriate future action."

The order required of defendant a *daily* graduation, the

burdens of which are pointed out by Inspector McGill (pp. 19, 63-64) in his report. The order also temporarily restricted defendant's output thus:

> "That it shall not hereafter permit the escape into the air of gases, the total *sulphur content* of which shall exceed twenty tons during one day from April 10th to October 1st of each year, or exceed forty tons in one day during any other season." (237 U. S. 680.)

Such limitation greatly reduced defendant's output — and it was granted leave "to apply for relief as it may be advised," on the coming in of the Inspector's report.

Defendant gave to Inspector McGill "every facility for the investigation and ever expressed the desire that it be made as thorough as possible." (See Report p. 71.)

On January 1st, 1916, Dr. McGill filed his report submitting that the limitations above quoted unnecessarily *burdened defendant*. He recommended that it be permitted to enlarge its output (approaching nearer its normal operations), to practically *double* the volume permitted by the order of June 1st, 1915. Literally, he recommended:

> "That, in ordinary conditions of the atmosphere, a total *sulphur content* of the gases escaping of not exceeding *forty tons per day* for two consecutive days during the period from May 1st to October 1st of each year be permitted, and not exceeding *eighty tons per day* for two consecutive days during the remaining months of the year." (See Report p. 60.)

The recommendations of Dr. McGill are summed up pp. 59-60 of his report, and his reasons are detailed through-

out. He concluded most positively that defendant could safely be permitted to nearer approach its normal operations during the period from 1909 to 1913 when *no question* had been raised by Georgia — and without *any* injury whatsoever to Georgia territory, and he so recommended.

Possibly, his report was misconceived or confusion resulted from the terms "gases," "sulphur dioxide" and "sulphur content." But we think Dr. McGill's report, considered as a whole, leaves no doubt that he used "sulphur content" in his recommendation on page 60 in the same sense the Court did in its order of June 1, 1915. He clearly distinguished between "sulphur content" and "sulphur dioxide."

Thus, on page 14, he said, "For convenience, the statements are made in terms of sulphur, which is *one-half* by weight of the sulphur dioxide." On page 7 he refers to "the sulphur content of the escaping gases;" and on page 17 to "sulphur escaping in the gases." Also to "the amount of escaping sulphur."

On page 57, he shows by test that under normal conditions applications of a mixture containing approximately six parts of sulphur dioxide to one million parts of air, a distance of twelve hundred yards from the plant caused injury to sensitive plants, but "the injury was not severe."

The fair inference is that less than six parts sulphur dioxide per million parts of air can result in but very slight injury. While on page 55 the Inspector shows that under normal conditions the sulphur dioxide from defendant's plant at a distance of one mile from the smelter, is so small as to be negligible — not greater than one part per million parts of air.

This would seem fully convincing that defendant's operations, to the limit proposed by Dr. McGill, could not possibly injure Georgia territory, inasmuch as he shows defendant's smelter over three miles from the Georgia line. (Report, p. 31.)

It is judicially known that now, for months past, and probably for at least a few months to come, copper and sulphuric acid are and have been in great demand. The limitation imposed by the decree of June 1, 1916, was deemed temporary, and defendant confidently believed the filing by Inspector McGill of "a full report of his observations, accompanied by recommendations as to appropriate future action" would work such modification as to permit an approach to normal operations, and the consequent utilization of its acid plant and other equipment.

The Inspector shows the acid plant has a capacity of 160 tons daily (report, p. 7), and that "Only twice during the six months here considered has the full capacity of 160 tons been realized." (Report, p. 18.) This was due to the difficulties pointed out by the Inspector, pages 17, 19, 63-4 of his report.

In this connection, the following excerpt from page 64 of the report is significant:

> "During the period between September 20th and October 1st, by agreement between counsel for the State of Georgia and the defendant, permission was granted Dr. McGill to conduct experimentally daily increases in the amount of sulphur escaping to the atmosphere, such total escape, however, during any one day not to exceed forty (40) tons; the object of these experiments being to note the effect of such increased amounts of sulphur upon growing vegetation prior to the natural plant maturity and the possible effects of early frosts."

Note, that no harmful results are chronicled — and but *twice* during the entire six months, and including the 10-day period above, was the capacity of the acid plant realized.

The acid plant was built at great outlay and according to the highest standard of the art. Its capacity was gauged and expensive equipment adjusted to adequately care for a daily recovery of sulphur content. It seems to have worked admirably from 1909 to 1913 — as no complaint was made in the meantime. Dr. McGill reports no resultant damage to Georgia territory, if defendant be permitted to practically double its output. His report is unexcepted to. The facts he related are not in dispute. His recommendations are not challenged.

Defendant therefore very respectfully, but earnestly, submits that its operations should be permitted to approach as nearly to normal as can be done with perfect security to Georgia territory; and that Inspector McGill's report of facts and recommendations, unexcepted to, should prevail.

And defendant asks a modification accordingly.

Respectfully submitted,

J. A. FOWLER,

W. B. MILLER,

Attorneys for Ducktown Sulphur, Copper & Iron Company.

The State of Georgia has this day received a copy of the foregoing motion and supporting memorandum. May 30, 1916.

CLIFFORD WALKER,
Attorney-General of Georgia.